FOR ARGUMENT

No. 89-645 (S)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MICHAEL MILKOVICH, SR.,

Petitioner,

—against—

THE LORAIN JOURNAL CO., THE NEWS HERALD and THEODORE DIADIUN,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF *AMICI CURIAE* OF DOW JONES & COMPANY, INC., THE AMERICAN SOCIETY OF NEWSPAPER EDITORS, ASSOCIATED PRESS, CABLE NEWS NETWORK, INC., CAPITAL CITIES/ABC, INC., CBS INC., GANNETT CO., INC., THE HEARST CORPORATION, MAGAZINE PUBLISHERS OF AMERICA, INC., McCLATCHY NEWSPAPERS, INC., THE MIAMI HERALD PUBLISHING COMPANY, NATIONAL BROADCASTING COMPANY, INC., NEWSDAY, INC., NEWSWEEK, INC., THE NEW YORK TIMES COMPANY, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, REUTERS INFORMATION SERVICES INC., SEATTLE TIMES COMPANY, SCRIPPS HOWARD, INC., THE SOCIETY OF PROFESSIONAL JOURNALISTS, TRIBUNE COMPANY, UNITED PRESS INTERNATIONAL, INC., THE WASHINGTON POST AND WESTINGHOUSE BROADCASTING COMPANY, INC., IN SUPPORT OF RESPONDENTS

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BRIEF *AMICI CURIAE* OF DOW JONES & COMPANY, INC., ET AL., IN SUPPORT OF RESPONDENTS

This brief is respectfully submitted, with the consent of the parties, pursuant to Rule 37 of the Rules of this Court, urging affirmance of the decision below of the Supreme Court of Ohio on the grounds that the matter alleged herein to be libelous constitutes opinion and that the First and Fourteenth Amendments to the Constitution of the United States therefore bar Petitioner's action.

INTEREST OF AMICI

Amici include writers, editors and publishers of newspapers, magazines and newswires, and owners of radio and television stations and networks, involved in communicating

news, information and opinion to the American public, and organizations of persons or entities involved in such communication. Each of the *amici* is more fully described in the Appendix annexed hereto. From time to time, *amici* or their members are targets of libel actions in which the question of legal protection for expression of opinion is an issue. The question presented in this case is therefore a matter of continuing and critical concern to *amici*. They and their constituents will be directly affected by the Court's resolution of the question now before it.

SUMMARY OF ARGUMENT

At common law, opinion was protected from defamation judgments under the doctrine of fair comment. Designed to preserve freedom of debate, fair comment became so entangled in caveats and qualifications differing from jurisdiction to jurisdiction that it did not adequately serve that goal. As the communications media became regional and national, subject to the laws of many jurisdictions, there arose serious danger, similar to that confronted in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), of unpopular opinion being punished by unsympathetic local juries employing vague legal standards. Against this backdrop, this Court observed in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974), that "[u]nder the First Amendment there is no such thing as a false idea." That statement formed the nucleus of the doctrine that opinion is directly protected by the Constitution, which has been adopted by the *Restatement (Second) of Torts*, every Federal Circuit and courts in most states. This view has largely supplanted the fair comment privilege. It is reinforced by opinions of this Court (i) holding that the *Gertz* language rendered epithets employed in a labor dispute non-actionable, (ii) emphatically repeating the *Gertz* statement in defamation-related cases, (iii) implying that the crossing of "the line between fact and opinion" by a communication has constitutional ramifications, and (iv) holding that, at least in cases treating media publications

about matters of public concern, the plaintiff has the burden of proving falsity, so that an opinion in such a case, which is incapable of being proved false, is necessarily non-actionable. (Point One.)

The purpose of the distinction between fact and opinion is the protection of free, subjective self-expression, both in order to protect personal liberty and as a means to further uninhibited public discussion. The distinction must be made with care so as not to submit what are essentially subjective judgments to the wholly inappropriate test of "truth." The fact/opinion dichotomy, under both common law and constitutional principles, distinguishes between the objective and the subjective—between statements about people, things and events in the physical world and statements that convey the speaker's attitude toward those people, things and events. Although the dividing line between fact and opinion may be uncertain in close cases, the constitutionally based protection is uniform and far simpler to administer than that embodied in the fair comment privilege. A proper drawing of the fact/opinion distinction assures broad editorial freedom in accordance with the Court's mandate to assure that public debate be "uninhibited, robust and wide-open." The most widely employed criteria offered as guidance in determining whether a communication is fact or opinion were set forth in *Ollman v. Evans*, 750 F.2d 970, 979 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985). When used with appropriate sensitivity to the dangers of prohibiting controversial speech, the *Ollman* criteria can provide a sound method for separating fact from opinion. *See Potomac Valve & Fitting, Inc. v. Crawford Fitting Co.*, 829 F.2d 1280 (4th Cir. 1987). Finally, as suggested by the logic of *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), because of the importance of assuring free debate, in cases where the balance is close, questionable statements should be treated as protected opinion rather than actionable assertions of fact. (Point Two.)

An opinion should not forfeit constitutional protection solely because it implies an accusation of criminal activity. This is particularly true with respect to statements contradicting sworn testimony. Such expression is often simply a state-

ment of personal disagreement with what has been said, and may be a quintessential expression of opinion. It would be anomalous to deprive speakers of protection for an expression of their disagreement solely because the statement with which they disagree was made under oath. Testimonial speech, like all other public speech, must be subject to full and free debate. (Point Three.)

The column at issue in this case, read in context, is opinion both under the applicable criteria set forth in the case law and the more general test of whether it conveys information about the outside world or the author's attitude toward such information. It is within the First Amendment protections for free speech and press to permit people to vent their thoughts and emotions under such circumstances. (Point Four.)

ARGUMENT

POINT ONE

CONSTITUTIONAL DOCTRINE HAS REPLACED THE COMMON LAW FAIR COMMENT PRIVILEGE IN PROTECTING EXPRESSIONS OF OPINION FROM DEFAMATION JUDGMENTS.

At common law, opinion received protection under the doctrine of fair comment. The Court's statement in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), that "[u]nder the First Amendment there is no such thing as a false idea," *id.* at 339, however, has given rise to law that has replaced the fair comment privilege. Opinion is now protected directly by the First and Fourteenth Amendments to the United States Constitution. All the federal circuits and courts in more than two-thirds of the states adhere to this position. It is rooted in the principles enunciated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and receives support from the Court's opinions in *Bose v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), and *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), as well as *Gertz*.

Under the common law, to recover for defamation a plaintiff was ordinarily required to prove only that a defamatory statement had been published about him. *See* L. Eldredge, *The Law of Defamation* § 5 at 15-16 (1978). In order to escape liability, the defendant had to establish either that the statement was true ("justification") or that it fell within the protection of one of several specific privileges, of which "fair comment" was the most prominent.

A defendant's fair comment plea required that he first prove that his statement was indeed comment or opinion,[1] precisely the issue that, in the constitutional context, troubled and divided the court below. *See, e.g.*, W. Prosser, *Handbook of the Law of Torts* 622 (2d ed. 1955); Titus, *Statement of Fact Versus Statement of Opinion—A Spurious Dispute in Fair Comment*, 15 Vand. L. Rev. 1203, 1204 (1962) ("the availability of the defense of fair comment oftentimes turns upon whether or not a particular statement will be placed into one cubbyhole called 'fact' or in another called 'opinion' "); Note, 62 Harv. L. Rev. 1207, 1212 (1949) ("the distinction, more often announced than defined, between comments and statements of fact is often crucial to the outcome of fair comment litigation"). A defendant relying on the common law privilege was also required to establish that his communication was about a matter of public concern; that it was based upon a true or privileged statement of fact or on facts otherwise known or available to the public; that it represented his actual opinion; and that it was not made solely for the purpose of causing harm to the target of the opinion. *Restatement of Torts*, § 606(1) (1938).

Additionally, from court to court and state to state, the privilege was hedged about with caveats and qualifications. Courts variously required, for example, that the communication at issue "not be 'unreasonably violent or vehement' or

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1 "The terms comment and opinion are used interchangeably in the cases . . ." Hill, *Defamation and Privacy Under the First Amendment*, 76 Colum. L. Rev. 1205, 1227 (1976). *Cf. Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974) apparently treating the words as synonyms; 36 C.J. *Libel and Slander* § 285 (1924).

'excessively vituperative'; that it . . . 'be a reasonable inference from facts truly stated'; that it . . . be presented in a 'proper manner' and be 'based upon reasonable or probable cause'; and especially that it . . . 'be fair.' " Hill, *Defamation and Privacy under the First Amendment*, 76 Colum. L. Rev. 1205, 1229-30 (1976) (footnotes omitted). Typically, "courts [were] content with general statements that the fairness or reasonableness of the comment [was] for the jury." *Id.* at 1233 (footnote omitted).

The purpose served by the common law protection for comment was essentially the same as that which later impelled the Court to establish constitutional limitations on defamation judgments: to insure that "debate on public issues [be] uninhibited, robust and wide-open. . . ." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).[2] While the common law tradition was, as members of this Court have recognized, "rich and complex," *see, e.g., Ollman v. Evans*, 471 U.S. 1127, 1129 (1985) (Rehnquist, J., dissenting from denial of certiorari, *quoting* Hill, *supra*, at 1239), its very richness and complexity rendered the fair comment privilege inadequate to fulfill its purpose of protecting free expression.

Thus, under the common law privilege:

> • A publisher suffered a substantial libel judgment for publishing an editorial referring to the plaintiff—who had accused the city police commissioner of incompetence—as "infamous" and harboring "a motive." The grounds: that the apparently ample facts

2 *See, e.g., Pearson v. Fairbanks Publishing Co.*, 413 P.2d 711, 714 (Alaska 1966) ("freedom of discussion and debate on public issues"); *Edmonds v. Delta Democrat Publishing Co.*, 230 Miss. 583, 591, 93 So. 2d 171, 173 (1957) (that "matters of a public nature may be freely discussed"); *Julian v. American Business Consultants, Inc.*, 2 N.Y.2d 1, 7, 155 N.Y.S.2d 1, 7, 137 N.E.2d 1, 5 (1956) ("[i]n furtherance of . . . the right to write freely"). *See also* Keeton, *Defamation and Freedom of the Press*, 54 Tex. L. Rev. 1221, 1222-23 (1976).

supporting the characterization, none of which the jury was permitted to learn, were not set forth in the editorial. *A.S. Abell Co. v. Kirby*, 227 Md. 267, 271, 176 A.2d 340, 341, 342 (1961).

> • A "good government" group's recommendation against a candidate for public office "because in the last legislature he championed measures opposed to the moral interests of the community" was held to be unprotected because the facts—that the plaintiff had voted for anti-temperence legislation—were not stated. The case was remanded for trial as to the "truth" of the opinion. *Eikhoff v. Gilbert*, 124 Mich. 353, 354, 83 N.W. 110, 111, 113 (1900).
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> • Withering, persistent criticism of one Oscar Triggs, a widely known English professor—"We cannot boast of having discovered Triggs, for he was born great, discovered himself early and has a just appreciation of the value of this discovery"—was held not, as a matter of law, to be fair comment. "[T]he question whether the criticism was fair and just or willfully assailed the reputation of the plaintiff, would be for the jury." *Triggs v. Sun Printing & Pub. Ass'n*, 179 N.Y. 144, 147, 154, 71 N.E. 739, 740, 742 (1904).
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> • An editorial in a Jewish newspaper, mocking the conduct of a prominent Jewish lawyer affiliated with a competing newspaper for arguing against adjourning a case for the Jewish New Year, saying his behavior made "all of us Jews look ridiculous," was held actionable subject to a jury determination as to whether an alleged "long-standing feud" between the newspapers was "sufficient to rebut the existence of the defense of fair comment." *Maidman v. Jewish Publications, Inc.*, 54 Cal. 2d 643, 647, 653, 654, 355 P.2d 265, 267, 270, 271, 7 Cal. Rptr. 617, 619, 622, 623 (1960), *overruled on other grounds, Brown v. Kelly Broadcasting Co.*, 48 Cal. 3d 711, 771 P.2d 406, 257 Cal. Rptr. 708 (1989).

Strongly held views, even on matters of obvious public concern, thus could not be aired with any assurance of

safety. A decision to speak out required first a prediction as to what state's law would govern any ensuing litigation, then a guess as to how a jury would determine issues as vague and subjective as whether the views were the speaker's "actual opinion," or were "excessively vituperative" or "unfair."

While the very process of submitting unpopular opinion to scrutiny by courts and juries endangers freedom of speech, the hazard increased dramatically as technology gave birth to publications and broadcasts disseminated widely, often nationally. There arose the threat of six- and seven-figure libel judgments resting on local juries' findings as subjective and ephemeral as that the criticism was "unfair" or "unreasonable."[3]

The danger to press freedom posed by the application of local defamation law to unpopular publications provided the stark backdrop for *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). That decision, of course, concerned defamatory false statements of fact, not assertions of opinion. In the context of a series of massive libel suits brought by local public officials against locally unpopular publishers and broadcasters from other parts of the country, *id.* at 278, n.18 and 295 (Black, J., concurring), the Court held, *inter alia*, that the common law rule requiring a defendant to prove truth in order to escape liability in such a case was constitutionally insufficient. "The rule . . . dampens the vigor and limits the variety of public debate. It is inconsistent with the First and

3 With respect to wire copy or syndicated material, an aggrieved person could bring separate actions in many jurisdictions, each applying its own common law standards. *See, e.g.*, Note, *Fact and Opinion After Gertz v. Robert Welch, Inc.: The Evolution of a Privilege*, 34 Rutgers L. Rev. 81, 87-88 (1981), describing a series of suits brought by a Congressman against newspapers carrying a syndicated column that allegedly accused him of anti-Semitic behavior. Most of the courts held the column to be non-libelous; one held it to be actionable and unprotected by the fair comment doctrine. *Sweeney v. Schenectady Union Pub. Co.*, 122 F.2d 288 (2d Cir. 1941), *aff'd*, 316 U.S. 642 (1942). *Cf. Walker v. Associated Press*, 388 U.S. 130 (1967). The Associated Press dispatch in *Walker* resulted in at least 15 different lawsuits by the plaintiff against various defendants throughout the United States. *Walker v. Pulitzer Publishing Co.*, 394 F.2d 800, 806-07 (8th Cir. 1968) (collecting cases).

Fourteenth Amendments." *Id.* at 279. The antidote: the Court's holding that a public-official plaintiff must prove "actual malice" with convincing clarity subject to independent appellate review before a libel judgment in his favor will be permitted to stand.

Had the *Sullivan* case involved an unpopular editorial rather than an unpopular advertisement—opinion and fair comment rather than fact and "justification"—the result would necessarily have been the same. Large verdicts directed against *New York Times* editorials critical of public officials in another region of the country, based solely on a publisher's failure to prove to a local jury's satisfaction that the article was "fair" or "presented in a proper manner" or constituted "a reasonable inference," would certainly and in equal measure have undermined the "unfettered interchange of ideas for the bringing about of political and social changes . . . ." *Sullivan*, 376 U.S. at 269 (*quoting Roth v. United States*, 354 U.S. 476, 484 (1957)).[4] Had such judgments thus threatened to impede the "free flow of ideas and opinions," which are "[a]t the heart of the First Amendment," *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988), the Court would doubtless have interceded to ensure protection beyond that offered by each state's law of fair comment.[5] It was not called upon to do so.[6]

4 The Founders "firmly adhered to the proposition that the 'true liberty of the press' permitted 'every man to publish his opinion.' " *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 149-50 (1967) (opinion of Harlan, J.), *quoting Respublica v. Oswald*, 1 Dall. 319, 325 (Pa. 1788).

5 *New York Times Co. v. Sullivan, supra*, itself had implications for protection of opinion. First, it required plaintiff to prove "actual malice." *Id.* at 280. Insofar as that implies that it is a public official's burden to prove falsity, *see Garrison v. Louisiana*, 379 U.S. 64, 74 (1964), such a plaintiff cannot prevail if the communication is an opinion that can be proved neither true nor false. *See* Franklin & Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 Wm. & Mary L. Rev. 825, 855-56 (1984).

Second, at footnote 30, the Court observed: "[A] defense of fair comment must [as a matter of constitutional law] be afforded for honest expression of

(footnote 6 appears on next page)

Against this legal landscape, in 1974, the Court made its provocative observation in *Gertz*:

> We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.

Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974). That statement has often been referred to as dictum.[7] Whatever the words' precise force as precedent, however, they have had an extraordinary impact on the law of defamation.

On the day the Court rendered its opinion in *Gertz*, it also decided *Letter Carriers v. Austin*, 418 U.S. 264 (1974). The Court held that the use of vigorous epithets in the context of a labor dispute could not support a defamation judgment, basing its holding, at least in part, on the *Gertz* principle that "there is no such thing as a false idea." *Id.* at 284. The epithets were opinion, as such unprovable, and therefore non-actionable. Although the *Gertz* language when stated was dictum, it was thus treated as authoritative by the Court on the same day it was first uttered.

Meanwhile, the American Law Institute was considering a revision of the *Restatement of Torts*. Note, *Fact and Opinion After Gertz v. Robert Welch, Inc.: The Evolution of a Privilege*, 34 Rutgers L. Rev. 81, 97-99 (1981). When it published the Second *Restatement*, three years after *Gertz*, the Institute abandoned the common law defense of fair comment reflected in the 1938 version of the *Restatement*. "The common law rule that an expression of opinion of the . . . pure . . . type may be the basis of an action for defamation now appears to have been rendered unconstitutional by U.S. Supreme Court decisions." *Restatement (Second) of Torts*, § 566 comment c (1977).

Jurisdiction by jurisdiction, an avalanche followed. Perhaps attracted by the protection that *Gertz* offered to full and free public discussion and the relative simplicity of the doctrine, court after court employed the *Gertz* language as a mandate for a constitutionally based rule providing immunity for expressions of opinion. The fair comment privilege was, simultaneously, all but abandoned.

Some courts explicitly held that *Gertz* had rendered the fair comment privilege obsolete.[8] Some implied as much by referring to the fair comment privilege but then deciding the case

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opinion based upon privileged, as well as true, statements of fact." 376 U.S. at 292. Indeed, the holding in *Sullivan* was based on the minority fair comment rule that misstatements of fact as well as comment about public figures were protected. *Coleman v. MacLennan*, 78 Kan. 711, 98 P. 281 (1908).

6 Before *Gertz*, the Court decided *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970), holding that use of the term "blackmail" as an epithet directed at a public figure "was not slander when spoken and not libel when [published]." *Id.* at 13. It is not clear from the Court's opinion whether it was suggesting that the statement was constitutionally protected because it was opinion, non-actionable because the plaintiff-public figure could not carry the *New York Times* burden of proving falsity, or protected as a matter of law under an ancient (although uncited) line of authority that mere insults are not defamatory (*see, e.g., Curtis Publishing Co. v. Birdsong*, 360 F.2d 344, 348 (5th Cir. 1966)), or otherwise.

7 *See, e.g., Ollman v. Evans*, 750 F.2d 970, 974 n.6 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985); *Keller v. Miami Herald Publishing Co.*, 778 F.2d 711, 715 n.11 (11th Cir. 1985); *Immuno, A.G. v. Moor-Jankowski*, 74 N.Y.2d 548, _____, 549 N.Y.S.2d 938, 941, 549 N.E.2d 129, 132 (1989).

8 *Koch v. Goldway*, 817 F.2d 507, 509 (9th Cir. 1987); *Pearce v. E.F. Hutton Group, Inc.*, 664 F. Supp. 1490, 1503 (D.D.C. 1987); *Yerkie v. Post-Newsweek Stations*, 470 F. Supp. 91, 94 (D. Md. 1979); *Mittelman v. Witous*, 1989 Ill. Lexis 172 at 18, 1989 Westlaw 154272 at 7 (Ill. 1989); *Ryan v. Herald Ass'n, Inc.*, 566 A.2d 1316, 1321-22 (Vt. 1989); *Hoffman Co. v. E.I. Du Pont de Nemours and Co.*, 202 Cal. App. 3d 390, 407 n.10, 248 Cal. Rptr. 384, 395 n.10 (1988); *Ferguson v. Watkins*, 448 So. 2d 271, 278 (Miss. 1984); *Nevada Independent Broadcasting Corp. v. Allen*, 99 Nev. 404, 413 n.6, 664 P.2d 337, 343 n.6 (1983); *Kotlikoff v. Community News*, 89 N.J. 62, 65, 444 A.2d 1086, 1087 (1982); *Marchiondo v. New Mexico State Tribune Co.*, 98 N.M. 282, 295, 648 P.2d 321, 334 (Ct. App. 1981).

solely on the basis of the Constitution.[9] Others considered the constitutional privilege first and then declared that the constitutional analysis had rendered superfluous any consideration of defendant's claim of fair comment.[10] As one court that *did* first consider fair comment felicitously put it, "Much of what we find it necessary to write in this opinion may be likened unto deciding whether or not a base runner touched third when it is clear that he was thrown out at home plate." *Brewer v. Memphis Publishing Co.*, 626 F.2d 1238, 1241-42, n.4 (5th Cir. 1980), *cert. denied*, 452 U.S. 962 (1981).

In adopting the *Gertz*-based rule, many courts seemed to bypass the principle that constitutional questions are to be addressed only after a review of state law demonstrates that constitutional consideration is necessary.[11] Several circuit courts explicitly stated that the constitutional privilege is to be analyzed before any consideration of state fair comment law.[12] Other circuits simply considered the constitutional

9 *Potomac Valve & Fitting, Inc. v. Crawford Fitting Co.*, 820 F.2d 1280, 1285 n.13 (4th Cir. 1987); *Action Repair, Inc. v. American Broadcasting Cos.*, 776 F.2d 143, 146-47 (7th Cir. 1985); *Ollman v. Evans*, 750 F.2d 970, 975 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985); *Orr v. Argus-Press Co.*, 586 F.2d 1108, 1114 (6th Cir. 1978), *cert. denied*, 440 U.S. 960 (1979); *Henderson v. Times Mirror Co.*, 669 F. Supp. 356, 358-59 (D. Colo. 1987), *aff'd*, 876 F.2d 108 (10th Cir. 1989); *Immuno A.G. v. Moor-Jankowski*, 74 N.Y.2d 548, 549 N.Y.S.2d 938, 549 N.E.2d 129 (1989); *Amcor Investment Corp. v. Cox Arizona Publications, Inc.*, 690 S.W.2d 775, 780-83 (Mo. 1985); *From v. Tallahassee Democrat, Inc.*, 400 So. 2d 52, 54, 57 (Fla. Dist. Ct. App. 1981), *petition denied*, 412 So. 2d 465 (Fla. 1982).

10 *Hoffman v. Washington Post Co.*, 433 F. Supp. 600, 603 (D.D.C. 1977), *aff'd*, 578 F.2d 442 (D.C. Cir. 1978); *Camer v. Seattle Post-Intelligencer*, 45 Wash. App. 29, 41 n.3, 723 P.2d 1195, 1202 n.3 (1986), *cert. denied*, 482 U.S. 916 (1987); *Mashburn v. Collin*, 355 So. 2d 879, 886 (La. 1977).

11 *See, e.g., Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 160 n.2 (1979), referring in a libel case to "the general principle that dispositive issues of statutory and local law are to be treated before reaching constitutional issues."

12 *Fudge v. Penthouse Int'l, Ltd.*, 840 F.2d 1012, 1016 (1st Cir.), *cert. denied*, 109 S. Ct. 65 (1988); *Koch v. Goldway*, 817 F.2d 507, 508-09 (9th Cir. 1987); *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1302 (8th Cir.) (en banc), *cert. denied*, 479 U.S. 883 (1986); *Ollman v. Evans*, 750 F.2d 970, 975 n.8 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985).

question directly, without explaining the departure from ordinary procedure.[13] In some jurisdictions, indeed, the rule extracted from *Gertz*, that statements of opinion are never false and can therefore never be actionable, seems to have been adopted as the State's new common law of fair comment. *See, e.g., Koch v. Goldway*, 817 F.2d 507, 508 (9th Cir. 1987) ("California . . . tends to conflate common law principles and constitutional doctrine on the definition of opinion"); *Keller v. Miami Herald Publishing Co.*, 778 F.2d 711, 716 (11th Cir. 1985) (following Florida law which follows the *Gertz*-based rule).

Now, 15 years after *Gertz*, every Federal Circuit,[14] and the courts of at least 36 States and the District of Colum-

13 *Stevens v. Tillman*, 855 F.2d 394, 398 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 1339 (1989); *Cianci v. New Times Publishing Co.*, 639 F.2d 54, 61 (2d Cir. 1980).

Some circuits follow the traditional rule of considering the non-constitutional fair comment privilege first. *Nanavati v. Burdette Tomlin Memorial Hospital*, 857 F.2d 96, 106 n.11 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1528 (1989); *Keller v. Miami Herald Publishing Co.*, 778 F.2d 711, 717 (11th Cir. 1985); *Brewer v. Memphis Publishing Co.*, 626 F.2d 1238, 1241-42 & n.4 (5th Cir. 1980), *cert. denied*, 452 U.S. 962 (1981); *Orr v. Argus-Press Co.*, 586 F.2d 1108, 1111-14 (6th Cir. 1978), *cert. denied*, 440 U.S. 960 (1979). Several in the latter group have criticized the formalistic necessity of considering the obsolete fair comment privilege before resolving the case under the dispositive constitutional privilege. *Brewer*, 626 F.2d at 1241-42 n.4; *Orr*, 586 F.2d at 1114.

In *Koch v. Goldway*, 817 F.2d 507, 508-09 (9th Cir. 1987), then-Judge Kennedy cited two reasons underlying the Ninth Circuit's policy of proceeding directly to the constitutional issue. First, the very state law that would be applied, California's, itself has rejected fair comment analysis in favor of the constitutional privilege. Second, he noted the significant number of federal appellate courts that decide fact/opinion issues in diversity cases under the federal constitutional standard.

14 **FIRST CIRCUIT:** *Fudge v. Penthouse Int'l, Ltd.*, 840 F.2d 1012 (1st Cir.), *cert. denied*, 109 S. Ct. 65 (1988); **SECOND CIRCUIT:** *Mr. Chow of New York v. Ste. Jour Azur S.A.*, 759 F.2d 219 (2d Cir. 1985); **THIRD CIRCUIT:** *Jenkins v. KYW, A Division of Group W, Westinghouse Broadcasting & Cable, Inc.*, 829 F.2d 403 (3d Cir. 1987); **FOURTH CIRCUIT:** *Potomac Valve & Fitting, Inc. v. Crawford Fitting Co.*, 829 F.2d 1280 (4th Cir. 1987); **FIFTH CIRCUIT:** *Lindsey v. Board of Regents of the University System of*

bia,[15] have held that opinion is constitutionally protected because "[u]nder the First Amendment there is no such

Georgia, 607 F.2d 672 (5th Cir. 1979); **SIXTH CIRCUIT:** *Falls v. Sporting News Publishing Co.*, 834 F.2d 611 (6th Cir. 1987); **SEVENTH CIRCUIT:** *Woods v. Evansville Press*, 791 F.2d 480 (7th Cir. 1986); **EIGHTH CIRCUIT:** *Secrist v. Harkin*, 874 F.2d 1244 (8th Cir.), *cert. denied*, 110 S. Ct. 324 (1989); **NINTH CIRCUIT:** *Ault v. Hustler Magazine, Inc.*, 860 F.2d 877 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1532 (1989); **TENTH CIRCUIT:** *Rinsley v. Brandt*, 700 F.2d 1304 (10th Cir. 1983) (false light action); **ELEVENTH CIRCUIT:** *Keller v. Miami Herald Publishing Co.*, 778 F.2d 711 (11th Cir. 1985) (looking to Florida law); **D.C. CIRCUIT:** *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985).

15 **ALASKA:** *Moffatt v. Brown*, 751 P.2d 939 (Alaska 1988); **ARIZONA:** *MacConnell v. Mitten*, 131 Ariz. 22, 638 P.2d 689 (1981); **CALIFORNIA:** *Baker v. Los Angeles Herald Examiner*, 42 Cal. 3d 254, 228 Cal. Rptr. 206, 721 P.2d 87 (1986), *cert. denied*, 479 U.S. 1032 (1987); **COLORADO:** *Bucher v. Roberts*, 198 Colo. 1, 595 P.2d 239 (1979); **CONNECTICUT:** *Goodrich v. Waterbury Republican-American, Inc.*, 188 Conn. 107, 448 A.2d 1317 (1982); **DELAWARE:** *Riley v. Moyed*, 529 A.2d 248 (Del. 1987); **DISTRICT OF COLUMBIA:** *Myers v. Plan Takoma, Inc.*, 472 A.2d 44 (D.C. 1983); **FLORIDA:** *Palm Beach Newspapers, Inc. v. Early*, 334 So. 2d 50 (Fla. Dist. Ct. App. 1976), *petition denied*, 354 So. 2d 351 (Fla. 1977), *cert. denied*, 439 U.S. 910 (1978); **GEORGIA:** *S&W Seafoods Co. v. Jacor Broadcasting*, 17 Media L. Rep. (BNA) 1105 (Ga. Ct. App. 1989); **ILLINOIS:** *Mittelman v. Witous*, 1989 Ill. Lexis 172, 1989 Westlaw 154272 (Ill. 1989); **INDIANA:** *Jamerson v. Anderson Newspapers, Inc.*, 469 N.E.2d 1243 (Ind. Ct. App. 1984); **KENTUCKY:** *Yancey v. Hamilton*, 17 Media L. Rep. (BNA) 1012 (Ky. 1989); **LOUISIANA:** *Mashburn v. Collin*, 355 So. 2d 879 (La. 1977); **MAINE:** *True v. Ladner*, 513 A.2d 257 (Me. 1986); **MARYLAND:** *Kapiloff v. Dunn*, 27 Md. App. 514, 343 A.2d 251 (Ct. Spec. App. 1975), *cert. denied*, 426 U.S. 907 (1976) (recognizing a constitutionally based fair comment privilege); **MASSACHUSETTS:** *Friedman v. Boston Broadcasters, Inc.*, 402 Mass. 376, 522 N.E.2d 959 (1988); **MICHIGAN:** *Hodgins v. Times Herald Co.*, 169 Mich. App. 245, 425 N.W.2d 522 (Ct. App. 1988); **MINNESOTA:** *Gernander v. Winona State University*, 428 N.W.2d 473 (Minn. Ct. App. 1988); **MISSISSIPPI:** *Meridian Star, Inc. v. Williams*, 549 So. 2d 1332 (Miss. 1989); **MISSOURI:** *Henry v. Halliburton*, 690 S.W.2d 775 (Mo. 1985); **MONTANA:** *Frigon v. Morrison-Maierle, Inc.*, 760 P.2d 57 (Mont. 1988); **NEBRASKA:** *Turner v. Welliver*, 226 Neb. 275, 411 N.W.2d 298 (1987); **NEVADA:** *Nevada Independent Broadcasting Corp. v. Allen*, 99 Nev. 404, 664 P.2d 337 (1983); **NEW HAMPSHIRE:** *Nash v. Keene Publishing Co.*, 127 N.H. 214, 498 A.2d 348 (1985); **NEW JERSEY:** *Kotlikoff v. Community News*, 89 N.J. 62, 444 A.2d 1086 (1982); **NEW MEXICO:** *Marchiondo v. Brown*, 98 N.M. 394, 649 P.2d 462 (1982); **NEW YORK:** *Immuno AG v.*

thing as a false idea." And while the Court has not explicitly ruled on the application of the *Gertz* language to protection for opinion, three decisions have been significant.

In *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984) (product disparagement), the Court quoted *Gertz* in relation to the First Amendment "freedom to speak one's mind," contrasting the "ideas" and "opinions" referred to in *Gertz* with speech "to which the majestic protection of the First Amendment does not extend . . . ." *Id.* at 503-04. Notably, the Circuit Court in *Bose*, 692 F.2d 189 (1st Cir. 1982), had considered whether the defendant's published review of the performance of the plaintiff's audio equipment was opinion protected under the *Gertz* statement or fact subject to the "actual malice" rule. Finding the fact/opinion distinction peculiarly difficult in that case, *id.* at 193-94, the Court of Appeals *assumed* the statement was factual and, exercising independent appellate review, held that "actual malice" had not been proved. *Id.* at 194-97.

Moor-Jankowski, 74 N.Y. 548, 549 N.Y.S.2d 938, 549 N.E.2d 129 (1989); **OHIO:** *Scott v. News-Herald*, 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986); **OKLAHOMA:** *Miskovsky v. Tulsa Tribune Co.*, 678 P.2d 242 (Okla. 1983), *cert. denied*, 465 U.S. 1006 (1984); **OREGON:** *Haas v. Painter*, 62 Or. App. 719, 662 P.2d 768, *review denied*, 295 Or. 297, 668 P.2d 381 (1983) (finding constitutional protection for opinion about public officials); **RHODE ISLAND:** *Healey v. New England Newspapers, Inc.*, 520 A.2d 147 (R.I. 1987), *cert. denied*, 110 S. Ct. 63 (1989); **SOUTH DAKOTA:** *Finck v. City of Tea*, 443 N.W.2d 632 (S.D. 1989); **TENNESSEE:** *Stones River Motors, Inc. v. Mid-South Publishing Co.*, 651 S.W.2d 713 (Tenn. Ct. App. 1983); **TEXAS:** *El Paso Times v. Kerr*, 706 S.W.2d 797 (Tex. Ct. App. 1986), *cert. denied*, 480 U.S. 932 (1987); **VERMONT:** *Ryan v. Herald Ass'n, Inc.*, 566 A.2d 1316 (Vt. 1989); **VIRGINIA:** *Chaves v. Johnson*, 230 Va. 112, 335 S.E.2d 97 (1985); **WEST VIRGINIA:** *Havalunch, Inc. v. Mazza*, 294 S.E.2d 70 (W. Va. 1981). Cases in other states indicate that those states are likely to hold that opinion is constitutionally protected. *See* **ARKANSAS:** *Bland v. Verser*, 299 Ark. 490, 774 S.W.2d 124 (1989) (finding that statements were factual, not constitutionally protected opinion); **IOWA:** *Jones v. Palmer Communications, Inc.*, 440 N.W.2d 884 (Iowa 1989) (stating in dictum that opinion is constitutionally protected); **NORTH CAROLINA:** *Renwick v. News & Observer Pub.*, 63 N.C. App. 200 304 S.E.2d 593 (1983), *rev'd on other grounds*, 310 N.C. 312, 312 S.E.2d 405, *cert. denied*, 469 U.S. 858 (1984).

In affirming, this Court said that "we share the concern of the Court of Appeals that the statements at issue tread the line between fact and opinion." 466 U.S. at 514. Unless that line had constitutional significance, there was no cause for "concern." The implication is clear: had the statements crossed the line into opinion rather than merely "treading" upon it, they would as a matter of constitutional law not have been actionable, as the Court of Appeals had indicated below.

In *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (intentional infliction of emotional harm), the Court employed the language of *Gertz* to emphasize the importance of the uninhibited exchange of ideas and opinions.

> At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. . . . We have therefore been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions. The First Amendment recognizes no such thing as a "false" idea.

Id. at 50-51 (citations omitted). The Court held that the crude parody before it contained no statement of fact that could be said to be "false" and could therefore be shown to have been made with the necessary "actual malice." *Id.* at 56-57. The holding parallels the *Gertz*-based doctrine that opinion cannot be actionable because, as a matter of constitutional law, it cannot be false.

Most important, in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), the Court held that, at least where communication by the media about matters of public concern is at issue,

> [T]he common law's rule on falsity—that the defendant must bear the burden of proving truth—must . . . fall . . . to a constitutional requirement that the plaintiff bear the burden of showing falsity . . . before recovering damages.

475 U.S. at 776.

The thrust of the *Gertz* statement was thus, to a significant extent, transformed into law by the holding of *Hepps*.[16] At common law, as discussed above, it fell to the defendant to prove truth. Opinion that could not be characterized as "true" or "false" was, for litigation purposes, therefore false and actionable. After *Hepps*, the plaintiff must prove falsity, at least in cases involving press defendants and statements about matters of public concern. *Id.* at 776-77. Opinion in such cases which cannot be characterized as "true" or "false" therefore *cannot* be actionable. That is exactly the thrust of the statement in *Gertz*.

POINT TWO

IN DRAWING THE LINE BETWEEN FACT AND OPINION, THE LODESTAR MUST BE THE PROTECTION OF THE FREE FLOW OF IDEAS AND OPINIONS.

By freeing subjective expression from judicial second-guessing, the constitutional umbrella for opinion does more than mechanically shelter statements incapable of proof in accordance with the *Gertz* language. It protects two overarching objectives of the First Amendment: the individual value of free self-expression—"the freedom to speak one's mind . . . [as] an aspect of individual liberty—and thus a good unto itself," *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503 (1984), and the societal and political value of cacophonous public debate—"the common quest for truth and the vitality of society as a whole," *id.* at 503-04.[17]

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16 Indeed, Petitioner appears to concede as much. (Br. at 24.)

17 "It is significant that the guarantee of freedom of speech and press falls between the religious guarantees and the guarantee of the right to petition for redress of grievances in the text of the First Amendment. . . . It partakes of the nature of both, for it is as much a guarantee to individuals of their personal right to make their thoughts public and put them before the community . . . as it is a social necessity required for the 'maintenance of our political system and an open society.' " *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 149 (1967) (opinion of Harlan, J.) (citation omitted).

Statements of fact, when subjected to appropriate constitutionally mandated safeguards, may be judged against a standard of truth consistently with First Amendment notions of free discussion and dispute. Statements of opinion cannot.

The distinction between fact and opinion, which arose under the common law, becomes pivotal under the constitutional doctrine. Upon its resolution alone depends the extent of protection for expression of points of view. It involves, *amici* submit, a separation of the objective from the subjective—a distinction between statements meant[18] and reasonably perceived to be about people, things and events in the physical world, on the one hand, and statements that are meant and are reasonably perceived to convey the speaker's *attitude toward* people, things and events, on the other.[19]

The Court has warned: "Uncertainty as to the scope of the constitutional protection can only dissuade protected speech—the more elusive the standard, the less protection it affords." *Harte-Hanks Communications, Inc. v. Connaughton*, 109 S. Ct. 2678, 2695 (1989). A description of exactly where the fact/opinion border lies is indeed elusive. But however difficult it may sometimes be, it is easier and surer to make that single distinction than to apply the common law privilege which *started* with the fact/opinion determination and added to it varying, amorphous and often conflicting sets of conditions, criteria and qualifications.

And although post-*Gertz* cases sometimes involve difficult determinations of what is fact and what is opinion, the ability of the author, editorialist and columnist to answer the

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18 If a defendant is found liable for defamation without any awareness that what he has written might be understood as a statement of fact, he has been held liable without fault, a result not permitted by *Gertz*. *See* Franklin & Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 Wm. & Mary L. Rev. 825, 834-51 (1984).

19 *Cf.* W. Lippman, *Public Opinion* 18 (MacMillan paperback ed. 1965): "Those features of the world outside which have to do with the behavior of other human beings, in so far as that behavior crosses ours, is dependent upon us, or is interesting to us, we call roughly public affairs. The pictures inside the heads of these human beings, the pictures of themselves, of others, of their needs, purposes, and relationship, are their public opinions."

simple question around which the constitutional protection revolves—"is it opinion?"—has provided them with dependable guidance about what can be said with safety. The practical result of the safe harbor[20] created by the *Gertz*-based protections has been comprehensive editorial freedom, fulfilling the constitutional mandate to protect "uninhibited, robust and wide-open" debate.

It has been argued that the dividing line between fact and opinion is not only elusive, it is logically impossible to draw. *See, e.g., Stevens v. Tillman*, 855 F.2d 394, 398-400 (7th Cir. 1988) (every statement contains elements of both). But, as one of the authors of this brief has argued,

> [T]he law does not separate assertions of fact and opinion from one another by logical mandate. It treats them differently both under the common law and constitutional principles as means to an end, to protect discussion about public people, issues and events.
>
> . . . Since in the interest of maintaining adequate liberty of expression the law has embraced what is essentially a fiction, the separability of fact from opinion, it is necessary to attempt to apply it from case to case, however difficult the application sometimes may be.

R. Sack, *Libel, Slander, and Related Problems* 156 (1980).

In order to make the fact/opinion determination in a manner that addresses the statement as a whole, consistent with the overall constitutional purposes for which the distinction is being made, courts have developed sets of criteria to be used in making the judgment. In *Ollman v. Evans*, 750 F.2d 970, 977 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127

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20 Petitioner suggests that in "fairly debatable" cases, the fact/opinion question should be resolved by the jury. (Br. at 30.) Although a small minority of state courts apparently agree, the Federal Circuits are in unanimous opposition. *See, e.g., Mr. Chow of New York v. Ste. Jour Azur, S.A.*, 759 F.2d 219, 224 (2d Cir. 1985). Adoption of Petitioner's view would rob the constitutional protection of its virtue of creating a safe harbor for opinion. The expense of routinely having to litigate through trial in order to determine whether a statement is fact or opinion, and the resulting inhibition of expression, militate against any such rule. *See Sullivan*, 376 U.S. at 279.

(1985), the court, after referring to previous attempts to fashion such tests,[21] proffered and applied comprehensive criteria to which reference has frequently since been made. They are: first, "the common usage or meaning of the specific language of the challenged statement itself;" second, "verifiability;" third, "the full context of the statement—the entire article or column, for example—inasmuch as other, unchallenged language surrounding the allegedly defamatory statement will influence the average reader's readiness to infer that a particular statement has factual content;" and fourth, "the broader context or setting in which the statement appears. Different types of writing have . . . widely varying social conventions which signal to the reader the likelihood of a statement being either fact or opinion." *Id.* at 979.

In a thoughtful and compelling opinion, Senior Circuit Judge Wisdom, sitting by designation on a panel of the Fourth Circuit in *Potomac Valve & Fitting, Inc. v. Crawford Fitting Co.*, 829 F.2d 1280 (4th Cir. 1987), reviewed the *Ollman* criteria. The court was considering a libel suit about an article in a newsletter distributed by the defendant business about results of supposedly "independent" testing of a product sold by the plaintiff, a competitor. After a detailed review of the testing, the article concluded: "This was a (purposely) very poor test designed to snow the customer." *Id.* at 1283, n.4.

Judge Wisdom, writing for the court, said that that statement standing alone was, indeed, verifiable. But the verifiability criterion, he said, was "a minimum threshold issue . . . ."[22] If a statement is not verifiable, it is not actionable. But,

21 In *Information Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 784 (9th Cir. 1980), for example, the court employed three criteria: the words' understanding in context, the circumstances under which they were uttered, and the phrasing of the statement—is it phrased, for example, " 'in terms of apparency.' " *See Ollman*, 750 F.2d at 977 n.12.

22 Inasmuch as the spare language of the *Gertz* dictum focuses on the impossibility of proving an idea to be false, some courts and commentators have focused on "disprovability" or "verifiability" as the sole criterion for protection of opinion. *See, e.g.*, Franklin & Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 Wm. & Mary L. Rev. 825, 878 (1984); *Hotchner v. Castillo-Puche*, 551 F.2d 910 (2d Cir. 1976), *cert. denied*, 434 U.S. 834 (1977); *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977).

If this test is applied mechanically by searching for some derogatory allegation that may be characterized as "false," as Judge Wisdom points out in *Potomac Valve*, 829 F.2d at 1288, it underprotects opinion. Opinion often contains factual contentions that, in an overall reading of the statement, neither carry the defamatory sting nor detract from the statement's subjective import as a whole. If, on the other hand, a single-factor verifiability test is applied thoughtfully with a view toward protection of free debate, it will yield results like those that are produced by the multi-criteria approaches. What is non-verifiable?—any statement whose thrust is to express the author's attitude toward the world rather than describing events occurring in it, *i.e.*, any statement of opinion.

> [e]ven when a statement is subject to verification . . . it may still be protected if it can best be understood from its language and context to represent the personal view of the author or speaker who made it. Thus *we reject the suggestion . . . that any "question of fact" which can be decided by a jury can be actionable as defamation*. Such a test ignores the underlying purposes of the fact/opinion distinction, and would lead to results that could not be reconciled with the developing case law in other circuits.

829 F.2d at 1288. (Emphasis supplied.)

Judge Wisdom pointed out that, while *Ollman* set forth criteria valuable in making the fact/opinion distinction, it did not teach how to apply them when the *Ollman* factors were not all pointing in the same direction.

> We hold that a verifiable statement, a statement that has failed the second *Ollman* factor, nevertheless qualifies as an "opinion" if it is clear from *any* of the three remaining *Ollman* factors, individually or in conjunction, that a reasonable reader or listener would recognize its weakly substantiated or subjective character—and discount it accordingly.

Id. (Emphasis in the original.)

The court held that, in context, it was clear that the statement before it was merely the author's conclusion based on specific facts referred to in the article, and therefore opinion protected by the Constitution. *Id.* at 1290.

The most crucial insight in Judge Wisdom's opinion is that identifying somewhere in a statement some derogatory assertion or implication that is not an "idea" cannot be the beginning and the end of the inquiry. Statements of opinion often contain within them assertions that, standing alone, sound like statements of fact. 829 F.2d at 1288. Moreover, by its sensitivity to the underlying task of separating the essentially "objective" from the essentially "subjective," by examining questionable statements in their entirety, by abjuring a mechanical approach, *Potomac Valve* addressed the identification of opinion broadly enough to assure the necessary latitude to allow people to "speak their minds," to give voice to the "pictures inside their heads." The *Potomac Valve* methodology, *amici* believe, is fundamentally sound, worthy of scrutiny, respect, and, ultimately, adoption by the Court in the context of this case.[23]

Finally, the question arises as to what courts should do when, after completing the process of attempting to separate fact from opinion, they remain unable to characterize the statement as either. *Amici* would urge a rule of construction suggested by the Court's reasoning in *Hepps*. 475 U.S. at 376. The Court was concerned that, in close cases, where the jury's verdict as to truth or falsity depends on who has the burden of proof, permitting the burden to be placed on the

23 The question of whether a statement is an opinion implying the existence of undisclosed defamatory facts, *see Restatement (Second) of Torts*, § 566 (1977), does not appear to be at issue in this case. *Amici* note, nonetheless, their agreement with the view of the *Ollman* court that, if the proper criteria are employed to determine whether a statement is opinion, the search for implied facts under § 566 becomes unnecessary. 750 F.2d at 984-85. *Amici* submit that the *Restatement* approach threatens to turn the attempt to distinguish fact from opinion wrongly into a mechanical search for some implication somewhere that can be said to be verifiable. *See* n.22, *supra*, and Petition for Writ of Certiorari, *New England Newspapers, Inc. v. Healey*, No. 88-1939 (*cert. denied*, 110 S. Ct. 63 (1989)).

defendant would result in the constitutionally unacceptable punishment of some speech that ought to be protected.

> In a case presenting a configuration of speech and plaintiff like the one we face here, and where the scales are in such an uncertain balance, we believe that the Constitution requires us to tip them in favor of protecting true speech.

Id.

Amici submit that a similar rule ought to apply to the distinction between fact and opinion. If, after careful application of appropriate criteria, the balance of the scales remain in doubt, "the Constitution requires [a court] to tip them in favor of protecting" speech, so that all who would express their views may do so with a margin of safety.

> [C]ourts should not find a statement to be disprovable if serious doubt on the issue exists. The danger to free expression and the danger to the judiciary of trying to resolve the unresolvable both require that a court not undertake a search for falsity unless the statement clearly is susceptible to such a determination. . . .

Franklin & Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 Wm. & Mary L. Rev. 825, 888 (1984).[24]

POINT THREE

A STATEMENT OF OPINION DISAGREEING WITH SWORN TESTIMONY DOES NOT FORFEIT CONSTITUTIONAL PROTECTION.

There is a thread of authority that "[a]ccusations of criminal activity, even in the form of opinion, are not constitu-

24 Such a rule would be roughly analogous to the requirement that a public official or public figure prove "actual malice" in fact-based cases with "convincing clarity." *Sullivan*, 376 U.S. at 279. The heightened standard is employed to assure that close cases do not result in silencing protected expression and to signal the value placed by society on the interest at risk in the litigation. *See Addington v. Texas*, 441 U.S. 418, 425 (1979).

tionally protected." *Cianci v. New Times Publishing Co.*, 639 F.2d 54, 63 (2d Cir. 1980) (citations omitted). While the reasoning is not clear, the "rule" may result from a perception that such charges, even when framed as opinion, are too "heavily laden with factual content," *id.*, to be within the constitutional safeguard.

If the dictum is meant to imply more than that a factual allegation of criminality does not become immune simply by stating it in the *form* of an opinion, it is mistaken. There are surely cases where an opinion that suggests criminality is protected. If an observer at a trial concludes that the judge or jury wrongfully acquitted a defendant by overlooking or misconstruing evidence, for example, expression of those misgivings must be permitted. *See, e.g., Southern Air Transport v. American Broadcasting Cos.*, 877 F.2d 1010, 1016-17 (D.C. Cir. 1989) (statement that plaintiff's operation was illegal was opinion); *Aldoupolis v. Globe Newspaper Co.*, 398 Mass. 731, 500 N.E.2d 794 (1986) (implication in op-ed column that accused were wrongly acquitted of rape was opinion).

This is particularly true with respect to perjury. An accusation of a crime typically involves an allegation about physical behavior—rape (*Cianci*), bribe-taking (*cf. Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 397 N.Y.S.2d 1299, *cert. denied*, 434 U.S. 969 (1977))—that did or did not happen. But an accusation of perjury is an assertion of false speech. To say that a person testifying under oath spoke falsely may be nothing more than to state one's strong disagreement with what has been said. It is often a quintessential expression of opinion.[25]

It is common for the most provocative charges to be made under oath—in verified complaints, in affidavits filed in court, during deposition testimony, and in the course of the

25 Calling someone a "liar" can be a statement of opinion. *See, e.g., Lauderback v. American Broadcasting Cos.*, 741 F.2d 193 (8th Cir.), *cert. denied*, 464 U.S. 1190 (1985); *Edwards v. National Audubon Soc'y*, 556 F.2d 113 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977); *Smith v. Levitt*, 227 F.2d 855 (9th Cir. 1955); *Bennett v. Transamerica Press*, 298 F. Supp. 1013, 1015 (S.D. Iowa 1969); *Stepien v. Franklin*, 39 Ohio App. 3d 47, 528 N.E.2d 1324 (1988).

widest variety of hearings or trials. Such sworn statements are ordinarily absolutely privileged when made, L. Eldredge, *The Law of Defamation*, § 73(k), (s) (1978), and conditionally privileged when publicly disseminated by the press. *Id.* at § 79. Extra-judicial denials of such charges are also common. It would be anomalous, at best, to strip legal protection from responses to such privileged charges solely because the original allegations were sworn and the plaintiff may therefore claim that he has been accused of "perjury."

Testimony, moreover, frequently bears on a matter of intense public concern. Sworn statements in a variety of forums as to who knew what, when—about the Iran/Contra operation or the break-in at the Watergate, for examples—have been the subject of vigorous public dispute. If there is to be full discussion of public issues, testimonial speech, like all other kinds, must be subject to free, even fierce, debate.

POINT FOUR

THE CHALLENGED STATEMENTS ARE CONSTITUTIONALLY PROTECTED EXPRESSIONS OF OPINION.

Respondents argue that the column at issue, under applicable constitutional principles, was a statement of opinion, not an allegation of fact. Although *amici* do not wish to repeat Respondents' arguments here, they respectfully offer several observations. *Amici* submit that the overall thrust of the column is clear—and it is not that Petitioner committed perjury at the Ohio court's due process hearing.

Respondent Diadiun, a sports columnist, was at a wrestling meet at which, following the disqualification of a home-team wrestler, a melee occurred among a partisan crowd. Four members of the visiting team—from the community in which Diadiun's newspaper was published—were hospitalized. Diadiun later attended an administrative hearing at which Petitioner Milkovich, the widely renowned coach of the home team, described the altercation and defended his role in it. Milkovich's testimony differed sharply from what Diadiun

personally remembered and believed others at the meet would remember. He stated in the column, for example, that what he saw as Milkovich's "wild gestures," which helped incite the violence, were "passed off" by Milkovich in his testimony as "shrugs." Three times, directly and indirectly, he appealed to "anyone who attended the meet" to compare Milkovich's testimony at the administrative hearing with what he saw at the meet, not with what Diadiun remembered or wrote.

Diadiun's view initially appeared to triumph. Milkovich's explanations to the administrative board apparently were not believed; his team was suspended from a post-season tournament and put on probation, while Milkovich was severely censured. But then, following further testimony from Milkovich at the due process hearing, which Diadiun believed to contain misstatements similar to those at the administrative hearing, a court overturned the first ruling. Milkovich's team was reinstated and his censure lifted.

Diadiun's reaction is easily understood. Milkovich had, in Diadiun's presence, testified to something Diadiun believed, on the basis of his personal observations, to be untrue. Lying appeared to Diadiun to be Milkovich's strategy and now, it seemed, the strategy had worked. The ultimate moral for students who saw what Milkovich had done and were aware of Milkovich's testimony, Diadiun thought, was that lying pays—a terrible lesson for an educator to teach children.

Was Diadiun's statement opinion? Employing the criteria of *Ollman* and *Potomac Valve, amici* submit, it was. It was phrased repeatedly in "terms of apparency." The words "seemed," "probably," and "apparently" (twice) appear in three successive crucial paragraphs toward the close of the article. It was a sports column where "vehement, caustic and sometimes unpleasantly sharp" opinions, *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), are routine: "The rookie can't hit a major-league curve;" "the owners are out to fleece the fans;" "the referee stole the game."[26]

26 *See, e.g. Henderson v. Times Mirror Co.*, 669 F. Supp. 356, 359-61 (D. Colo. 1987), *aff'd*, 876 F.2d 108 (10th Cir. 1989); *Brooks v. Paige*, 773

The column repeatedly relied not on Diadiun's recollection of the facts alone, but on the perception of the others who also witnessed them. Diadiun's charge was that *those who were at the meet* "know *in [their] heart[s]* that Milkovich . . . lied. . . ." All of these factors point toward a proper characterization of the column as opinion, not fact.

The statements in the column should be understood as they must have been when read in the sports pages in Mentor, Ohio, not as they appear in the appendix of a brief 15 years later. They related to a matter of pressing public concern in a small town: pandemonium at a sporting event involving the local high school team; four local teenagers sent to the hospital; a famous rival wrestling coach implicated in the violence; a heated controversy as to where responsibility lay; administrative hearings and disputed testimony; a resulting probation of the rival wrestling team and censure for the coach; a lawsuit by the parents of the suspended wrestlers; and then a court's reinstatement of the team and the coach on what must have been viewed as the "technicality" of a due process violation.

Against the background of a high profile controversy in a small community, what was Diadiun's column meant and perceived to do? To convey facts about the events in question? Certainly not. The column's author specifically pleaded with his readers not to rely on him for the facts, but to refer to any one of the "2000 plus" others who also knew them first-hand—"anyone who was at the meet." Factual allegations one way and another were doubtless reported, known throughout the town and heatedly debated. Indeed, they were available such that readers, as Diadiun asked, could make up their own minds.

P.2d 1098, 1101 (Colo. App. 1989); *Stepien v. Franklin*, 39 Ohio App. 3d 47, 51, 528 N.E.2d 1324, 1329 (1988); *Parks v. Steinbrenner*, 131 A.D.2d 60, 62-66, 520 N.Y.S.2d 374, 375-78 (1987); *Hoeppner v. Dunkirk Printing Co.*, 254 N.Y. 95, 98-99, 172 N.E. 139, (1930) (under common law, vigorous criticism of high school coach protected because of the "safety valve" nature of sports and related public criticism, except in cases where proof of personal ill will defeats the fair comment privilege).

Was it designed and understood to communicate the author's *attitude* toward these widely known events? Precisely. In Diadiun's view, through foul play, the bad guys had won. And Diadiun was furious. Can this expression of his outrage be meaningfully judged to be true or false? *Amici* submit that it cannot. His outcry was a statement of deeply held, angry opinion about a matter of serious community concern.

Memories of Ebbets Field and the Brooklyn Dodgers evoke the old refrain: "We wuz robbed!" "We wuz robbed" is not so different from what sports columnist Diadiun was saying. It cannot be put to a true/false test without endangering the ability of reporters and fans to get mad, to participate fully in the tumult and the shouting of American spectator sports. Permitting people to express their emotions as well as their thoughts is, *amici* submit, a central purpose of the First Amendment. Such expressions are opinion, wisely protected by the Constitution.

CONCLUSION

When combined with the doctrine developed by the Court over the past quarter-century guarding assertions of fact against censorship by defamation judgment, firm recognition by the Court of careful and thorough protection for assertions of opinion would make a profound contribution toward assurance that, under the Constitution, full and free debate is guaranteed. *Amici* respectfully urge that the judgment of the Supreme Court of Ohio be affirmed.

Dated: April 6, 1990

Respectfully submitted,

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APPENDIX

DESCRIPTION OF AMICI CURIAE

The American Society of Newspaper Editors is a nationwide, professional organization of more than 1,000 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded over 50 years ago, include the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

Associated Press, the world's largest newsgathering organization, is a mutual news cooperative organized under the Not-for-Profit Corporation Law of the State of New York, and engages in the gathering and distribution of news of local, national and international importance to its member newspapers and broadcast stations across the United States and throughout the World.

Cable News Network, Inc. provides the nation with two 24-hour television news services, CNN and Headline News. Its news and information programming reaches more than 51 million households in the United States. Its programming is also carried worldwide.

Capital Cities/ABC, Inc., through its subsidiaries, operates the ABC radio and television networks, which produce several daily and weekly news broadcasts. Capital Cities/ABC, Inc. is also the owner of television and radio stations located in major cities throughout the United States. In addition, Capital Cities/ABC, Inc. owns several daily and weekly newspapers located throughout the country and many special interest and trade publications.

CBS Inc. is the owner of television and radio broadcasting stations and the operator of national television and radio networks.

Dow Jones & Company, Inc. publishes, *inter alia*, *The Wall Street Journal*, the largest circulation daily newspaper in the country, as well as *Barron's National Business and Financial Weekly*, the Dow Jones News Services and, through its

Ottaway Newspapers, Inc. subsidiary, newspapers in 29 communities in 13 states.

Gannett Co., Inc. publishes 83 daily newspapers, including *USA Today*, 52 non-daily publications, and a newspaper magazine. It operates 10 television stations, 16 radio stations and a national news service.

The Hearst Corporation is a diversified privately held communications company. It publishes numerous nationally distributed consumer magazines, daily and non-daily newspapers, business publications and hard-cover and soft-cover books. It also owns and operates a leading features syndicate and several television and radio broadcast stations.

Magazine Publishers of America, Inc. ("MPA") is a national trade association including in its present membership 218 domestic magazine publishers who publish 756 magazines sold at newsstands and by subscription. MPA members provide broad coverage of domestic and international news in weekly and biweekly publications, and publish weekly, biweekly and monthly publications covering literature, religion, law, political affairs, science, agriculture, industry and many other interests, avocations and pastimes of the American people.

McClatchy Newspapers, Inc. owns and operates *The Sacramento Bee* and 15 other newspapers in California, Washington, Alaska and South Carolina, with a total circulation of approximately one million.

The Miami Herald Publishing Company is a division of Knight-Ridder, Inc., a Florida corporation, and publishes *The Miami Herald*, a daily newspaper in Miami, Florida, which is distributed throughout the State of Florida.

National Broadcasting Company, Inc. owns and operates a national television network. NBC itself and its subsidiaries operate television stations, all of which are engaged in the gathering and dissemination of news to the public.

Newsday, Inc. publishes *Newsday* and *New York Newsday* and is a wholly-owned subsidiary of The Times Mirror Company.

Newsweek, Inc., a subsidiary of The Washington Post Company, publishes *Newsweek* magazine, a weekly international newsmagazine with a U.S. readership in excess of 19 million.

The New York Times Company owns and publishes *The New York Times*, a daily newspaper with a national circulation of 1.1 million and over 1.65 million on Sunday. The Company also owns five TV stations, 2 radio stations, 35 regional newspapers and seventeen national magazines.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of news reporters and editors dedicated to protecting the First Amendment interests of the news media. The Reporters Committee has appeared in virtually every recent case in this Court involving the First Amendment rights of reporters to gather and disseminate news and information.

Reuters Information Services Inc. is the primary North American operating company of Reuters Holdings PLC, the international news and financial information organization. Reuters supplies information to both business subscribers and to the news media. It obtains its information from approximately 162 exchanges and over-the-counter markets, from data contributed directly by more than 3,715 subscribers in 82 countries and from a network of 1,268 journalists, photographers and cameramen.

Seattle Times Company publishes *The Seattle Times*, the largest daily and Sunday circulation newspaper in the Pacific Northwest, and also publishes the *Walla Walla Union-Bulletin*.

Scripps Howard, Inc. is one of the largest communications companies in the country. Scripps Howard owns newspapers, including *The Cincinnati Post*, television and radio stations, including stations WEWS-TV (Cleveland) and WCPO-TV (Cincinnati), and a variety of other media enterprises across the United States. One out of nine Americans is a Scripps Howard reader, viewer or listener.

The Society of Professional Journalists is a voluntary, not-for-profit organization of nearly 20,000 members. The Society is the largest and oldest organization of journalists in the United States, representing every branch and rank of print and broadcast journalism.

Tribune Company is the nation's fourth largest newspaper publisher, with seven daily and Sunday papers, including *Chicago Tribune* and New York *Daily News*. Other Tribune subsidiaries own and operate television and radio stations in six major markets.

United Press International, Inc. generates and compiles news and information reports and produces photographs on a worldwide basis, all of which are transmitted for sale primarily to media industry subscribers such as newspapers and radio and television broadcasters. It maintains 200 offices and bureaus in 90 countries, staffed by 1,150 full-time employees and 4,000 contributory correspondents.

The Washington Post, a division of The Washington Post Company, is a daily newspaper circulated in Washington, D.C., Maryland and Virginia, with a daily circulation of 773,000 and a Sunday circulation of 1,126,000.

Westinghouse Broadcasting Company, Inc. through its subsidiaries owns and operates five network affiliated television stations and 20 radio stations, including four all-news radio stations. It is also a producer and distributor of broadcast and cable programming.